Public Prosecutor v Ishak bin Hj Shaari & other appeals

COURT OF APPEAL (KUALA LUMPUR) CRIMINAL APPEALS NO M-09-18 OF 97, W-09-15 OF 98 AND W-09-10 OF 2000

AHMAD FAIRUZ PCA, DENIS ONG, MOHD NOOR AHMAD, PS GILL AND MOHD GHAZALI JJCA

15 AUGUST 2003

Criminal Procedure *— Trial — Misdirection — Misdirection by trial judge on the standard of proof — Whether misdirection occasioned any failure of justice — Whether misdirection curable — Criminal Procedure Code s 422*

In these three appeals, the respondents had each been convicted of various offences in the subordinate courts. The trials in the subordinate courts had been concluded before the amendment to s 173(f) of the Criminal Procedure Code ('the CPC') took effect. As such, the law prior to the amendment, as established by case law, applied. On appeal, the respective High Court judges found that the trial judges had misdirected themselves on the standard of proof on the prosecution at the end of its case. The High Courts concluded that such misdirections were illegalities and, therefore, were not curable under s 422 of the CPC. They quashed the convictions, set aside the sentences and ordered a retrial. The prosecution appealed.

Held, dismissing two of the appeals and upholding the orders for a retrial and applying the proviso to s 60(1) of the Courts of Judicature Act 1964 ('the Act') to the last appeal, allowing the last appeal and restoring the conviction and sentence:

(1) The decisions on cases relating to the standard of proof at the close of the prosecution case have given rise to two opposite views in the appellate courts on the interpretation of s 422 of the CPC in relation to a misdirection on the standard of proof. The first view was that a misdirection on the standard of proof was an illegality not curable under s 422 where it involves the breach of an explicit provision of the CPC or where the breach involves a principle of general importance in the administration of justice. The other view seems to hold otherwise if the misdirection does not occasion any failure of justice (see p 592D–F); *Surandran a/l Rajaretnam v Public Prosecutor* [1998] 2 MLJ 49, *Harun bin Abdullah v Public Prosecutor* [1998] 3 MLJ 1, *Public Prosecutor v Pasupathy s/o Kanagasabai* [2001] 2 MLJ 143 and *PP v Ku Yahya Ku Bahari & Anor* [2002] 1 CLJ 113 referred.

(2) With regard to the opposite view, while it is not open to a High Court judge to rely on the proviso to s 60(1) of the Act, that proviso being exclusive to the Court of Appeal and the Federal Court, the provisions of s 422 of the CPC are in pari materia with the proviso to s 60(1) of the Act. There would be no miscarriage or failure of justice where there is sufficient evidence to warrant

the conviction. The words 'failure of justice' in s 422 of the CPC carry the same meaning as 'miscarriage of justice' under the proviso to s 60(1) of the Act (see p 593G–I); *Rosli bin Supardi v Public Prosecutor* [2002] 3 MLJ 256 and *Lokhman bin Abu v Public Prosecutor* [2001] 1 MLJ 311 followed, *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251 referred, *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 followed.

(3) Section 422(a) of the CPC states 'any error, omission or irregularity ...'. It does not mention 'illegality'. However, the distinction between an illegality and an irregularity is properly one of degree rather than of kind. The absence of the mention of 'illegality' in the provision means that the court has the discretion to decide, in a particular case, whether any error, omission or irregularity is to be curable, ie whether it has occasioned a failure of justice (see p 598G–H).

(4) Thus the Court of Appeal's approach to the misdirection for the purpose of s 422 of the CPC was to identify the error, then to identify the provision of the CPC that has been breached and then to apply the case law in order to determine whether the error could be cured by reason that the misdirection has not occasioned a failure of justice. If, but only if, the error has occasioned a failure of justice, would the Court of Appeal declare the trial a nullity by reason that the misdirection amounted to an illegality (see p 599B–D).

[Bahasa Malaysia summary

Dalam tiga rayuan ini, responden masing-masing telah disabitkan dalam mahkamah rendah. Perbicaraan dalam mahkamah rendah telah berakhir sebelum pindaan kepada s 173(f) Kanun Acara Jenayah ('KAJ') berkuatkuasa. Maka undang-undang sebelum pindaan tersebut, seperti terbentuk melalui kes-kes, terpakai. Semasa rayuan, Hakim-hakim Mahkamah Tinggi masing-masing mendapati hakim-hakim perbicaraan telah tersalah mengarahkan diri mereka akan beban bukti ke atas pihak pendakwa pada penghujung kesnya. Mahkamah Tinggi-mahkamah tinggi mendapati salah arah tersebut adalah kepenyalahan undang-undang dan oleh itu tidak dapat diperbetulkan dibawah s 422 KAJ. Mereka telah membatalkan sabitan, mengenepikan hukuman dan mengarahkan bicara semula. Pendakwa telah merayu.

Diputuskan, menolak dua daripada rayuan tersebut dan mensahkan perintah bicara semula dan, memakai proviso kepada s 60(1) Akta Mahkamah Kehakiman 1964 ('Akta tersebut') dalam rayuan terakhir, membenarkan rayuan terakhir dan mengembalikan sabitan dan hukuman:

(1) Keputusan-keputusan dalam kes-kes berkaitan beban bukti pada penghujung kes pendakwa telah mewujudkan dua pandangan

bertentangan dalam mahkamah-mahkamah rayuan mengenai tafsiran s 422 KAJ berkaitan salah arah akan beban bukti. Pandangan pertama adalah bahawa salah arah berkaitan beban bukti adalah suatu kepenyalahan undang-undang yang tidak dapat diperbetulkan di bawah s 422 di mana ia melibatkan pelanggaran peruntukan nyata KAJ atau di mana pelanggaran itu melibatkan suatu prinsip penting umum dalam pentadbiran keadilan. Pandangan seterusnya mendapati sebaliknya sekiranya salah arah tersebut tidak menimbulkan kegagalan keadilan (lihat ms 592D–F) *Surandran a/l Rajaretnam v Public Prosecutor* [1998] 2 MLJ 49, *Harun bin Abdullah v Public Prosecutor* [1998] 3 MLJ 1, *Public Prosecutor v Pasupathy s/o Kanagasabai* [2001] 2 MLJ 143, *PP v Ku Yahya Ku Bahari & Anor* [2002] 1 CLJ 113 dirujuk.

(2) Berkaitan dengan pandangan kedua, walaupun seseorang hakim Mahkamah Tinggi tidak dapat bergantung kepada proviso kepada s 60(1) Akta tersebut, memandangkan yang peruntukan itu khas bagi kegunaan Mahkamah Rayuan dan Mahkamah Persekutuan, peruntukan dalam s 422 KAJ adalah sama dengan proviso kepada s 60(1) Akta tersebut. Tiada sebarang salah laksana keadilan atau kegagalan keadilan sekiranya terdapat bukti mencukupi bagi mewajarkan sabitan. Perkataan 'failure of justice' dalam s 422 KAJ membawa maksud yang sama dengan perkataan 'miscarriage of justice' di bawah proviso kepada s 60(1) Akta tersebut (lihat ms 593G–I); *Rosli bin Supardi v Public Prosecutor* [2002] 3 MLJ 261 dan *Lokhman bin Abu v Public Prosecutor* [2001] 1 MLJ 311 diikut, *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251 dirujuk dan *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 diikut.

(3) Seksyen 422(a) KAJ menyatakan 'any error, omission or irregularity ...'. Ia tidak menyatakan 'illegality'. Walau bagaimanapun, perbezaan antara kepenyalahan undang-undang dan luar aturan sebetulnya adalah tahap dan bukannya jenis. Ketiadaan penyebutan 'illegality' dalam peruntukan itu bermaksud mahkamah mempunyai budi bicara memutuskan, dalam sesuatu kes, sama ada sebarang kesilapan, peninggalan atau luar aturan patut diperbetulkan, iaitu sama ada ia telah mengakibatkan kegagalan keadilan (lihat ms 598G–H).

(4) Maka pendekatan Mahkamah Rayuan kepada salah arah bagi maksud s 422 KAJ adalah mengenalpasti kesilapan, kemudian mengenalpasti peruntukan KAJ yang telah dilanggar dan seterusnya memakai kes-kes bagi menentukan sama ada kesilapan tersebut dapat diperbetulkan olek kerana salah arah tersebut tidak mewujudkan suatu kegagalan keadilan. Jika, dan hanya jika, kesilapan itu telah mewujudkan suatu kegagalan keadilan, akan Mahkamah Rayuan mengisytiharkan perbicaraan sebagai batal di atas alasan bahawa salah arah itu adalah suatu kepenyalahan undang-undang (lihat ms 599 B–D).]

Notes

For cases on misdirection in trials, see 5 *Mallal's Digest* (4th Ed 2001 Reissue), paras 4105-4107.

Cases referred to

Arulpragasan a/l Sandaraju v Public Prosecutor [1997] 1 MLJ 1 (refd)
Harun bin Abdullah v Public Prosecutor [1998] 3 MLJ 1 (refd)
Haw Tua Tau v Public Prosecutor; Tan Ah Tee v Public Prosecutor; Low Hong Eng v Public Prosecutor [1981] 2 MLJ 49 (refd)
Ishak Shaari v Public Prosecutor [1997] 3 CLJ Supp 223 (refd)
Khoo Hi Chiang v Public Prosecutor and another appeal [1994] 1 MLJ 265 (refd)
Lokhman bin Abu v Public Prosecutor [2001] 1 MLJ 311 (folld)
Lorensus Tukan v Public Prosecutor [1988] 1 MLJ 251 (refd)
PP v Ku Yahya Ku Bahari & Anor [2002] 1 CLJ 113 (refd)
Public Prosecutor v Pasupathy s/o Kanagasabai [2001] 2 MLJ 143 (refd)
Pulukuri Kottaya & Ors v Emperor AIR 1947 PC 67 (refd)
Reid v The Queen [1980] AC 343(refd)
Rosli bin Supardi v Public Prosecutor [2002] 3 MLJ 256 (folld)
Surandran a/l Rajaretnam v Public Prosecutor [1998] 2 MLJ 49 (refd)
Tan Boon Liat @ Allen & Anor et al; Tan Boon Liat, Re v Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors [1977] 2 MLJ 108 (refd)
Tunde Apatira & Ors v Public Prosecutor [2001] 1 MLJ 259 (folld)
Willie (William) Slaney v State of Madhya Pradesh AIR 1956 SC 116 (refd)

Legislation referred to

Penal Code ss 182, 376, 499
Courts of Judicature Act 1964 proviso to s 60(1), proviso to s 92
Criminal Procedure Code ss 173(f), 422
Penal Code 1898 [India] ss 34, 302, 537, (a), proviso to s 162
Penal Code 1973 [India] s 465(1)

Appeal from

Rayuan Jenayah No 42-12-96 (High Court, Melaka)
Rayuan Jenayah No 41-123-95 (High Court, Kuala Lumpur)
Rayuan Jenayah No 42-31-94 (High Court, Kuala Lumpur)

K Muniandy (*Engku Nor Faizah*, *Anselam Fernandez*, *Abd Wahab* and *Nurul Huda* with him) (Attorney-General's Chambers) for the appellants.

Karpal Singh (*M Athimulan*, *M Sathia*, *Jagdeep Singh Deo*, *Govind Singh Deo*, *Ram Karpal Singh* and *Zainal Ithnin* with him) (*Karpal Singh & Co*) for the respondents.

Mohd Noor Ahmad JCA (delivering judgment of the court): The three appeals were heard together.

(1) In Criminal Appeal No M-09-18-97, the respondent was charged with rape, an offence under s 376 of the Penal Code ('the Code'). At the end of the trial in the sessions court he was convicted and sentenced to 15 years' imprisonment and whipping of six strokes. On appeal, the learned judge quashed the conviction, set aside the sentence and ordered a retrial before another sessions court judge. The learned judge held that the learned sessions court judge misdirected himself on the standard of proof on the prosecution at the end of its case when he called for the defence after having found that the prosecution had established a prima facie case against the respondent. And further, the learned sessions court judge erred in not using the test of beyond reasonable doubt at the end of the case when he held that the respondent failed to raise any reasonable doubt in the prosecution case and therefore, he found the respondent guilty and convicted.

In a nutshell, the learned judge found that the errors made by the learned sessions court judge were the combination of the two standards of proof at the end of the prosecution case and the omission to make a finding at the end of the whole case that the charge against the respondent had been proved beyond reasonable doubt. The learned judge concluded that the misdirections were illegalities and therefore, s 422 of the Criminal Procedure Code ('the CPC') could not be invoked to cure a breach as it involved the breach of an explicit provision of the CPC or as the breach involved a principle of general importance in the administration of justice. His conclusion was to a great extent pitched on the basis that the rules relating to the burden of proof are largely rules of substantive law and that there are mandatory rules, even of procedure, which cannot be passed over lightly as 'irregularities', because they are incurably illegal as being in contravention of strictly imperative provisions and cited the case of *Re Tan Boon Liat @ Allen & Anor et al; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108 in support thereof.

Further, the learned judge stated that the power entrusted to the Court of Appeal and the Federal Court by the Courts of Judicature Act 1964 ('the Act') (the proviso to s 60(1) and the proviso to s 92, respectively) is far more wide-ranging than the power of the High Court under s 422 of the CPC.

(2) In Criminal Appeal No W-09-15-98, the respondent was charged with abetment of one Siti Khatijah @ Mary Anne in committing two offences under s 182 of the Code for giving false information to police officers with intent to cause them to use their lawful power to the injury of certain persons. The respondent also faced an additional seven charges of criminal defamation under s 499 of the Code in respect of those persons allegedly criminally defamed by Siti Khatijah @ Mary Anne. In the joint trial in the magistrate's court Siti Khatijah

@ Mary Anne faced two charges under s 182 of the Code and seven charges of criminal defamation under s 499 of the Code in respect of those persons. However, her appeal in Criminal Appeal No W-09-14-98 was not proceeded with. The respondent was convicted and sentenced to six months imprisonment and a fine of RM2,000 on each offence for the abetment and in default to six months' imprisonment and to 1 year imprisonment and a fine of RM8,700 on each offence under s 499 of the Code and in default to six months' imprisonment. The sentences of imprisonment were ordered to run consecutively. The respondent was also ordered to pay the costs for prosecution, to be assessed by the Registrar. On appeal, the learned judge quashed the convictions, set aside the sentences and ordered a retrial on all the charges. The learned judge held that the learned magistrate misdirected herself on the standard of proof on the prosecution at the end of its case when she found the prosecution had established a prima facie case against the respondent and called for the defence. The learned judge adopted the view of Augustine Paul JC (as he then was) in Criminal Appeal No M-09-18-97, as reported in *Ishak Shaari v Public Prosecutor* [1997] 3 CLJ Supp 223 and concluded that the misdirection, being a breach of substantive law, not merely of procedural law, could not be cured by s 422 of the CPC. Further, the learned judge stated that although the Federal Court and the Court of Appeal have identical power under the proviso to s 92 and the proviso to s 60, respectively, of the Act to dismiss the appeal if the court considers no substantial miscarriage of justice has occurred, the High Court has no such power.

(3) In Criminal Appeal No W-09-10-00, the respondent was charged with an offence under s 403 of the Code (dishonest misappropriation of shares). The learned sessions court judge found him guilty, convicted and sentenced him to one day imprisonment and a fine of RM20,000 and in default to six months' imprisonment. The respondent paid the fine. On appeal by the respondent against conviction and sentence and cross-appeal by the Public Prosecutor on sentence, the learned judge quashed the conviction, set aside the sentence, ordered the fine to be refunded and ordered the case to be retried. The learned judge held that the learned sessions court judge misdirected himself when at the close of the prosecution case, he found that the prosecution had established a prima facie case against the respondent as charged and called upon the respondent to make his defence. The learned judge followed his earlier decision in Criminal Appeal No W-09-15-98, and fortified by the judgment of Abdul Malek Ahmad JCA (as he then was) in *Harun bin Abdullah Public Prosecutor* [1998] 3 MLJ 1, concluded that the misdirection on the burden of proof rendered the proceedings a nullity and that s 422 of the CPC could not be invoked.

2(1) Before us, the learned deputy public prosecutor ('DPP') contended that the misdirections in the appeals were in fact errors in the judgments which arose as the result of the decision of the Federal

A Court in *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 which held that the standard of proof required from the prosecution at the close of its case was the beyond all reasonable doubt standard of proof. The errors were not intended by the trial courts since the appeals were in respect of cases heard and disposed of before *Arulpragasan* was decided because at the relevant time the prima facie B standard of proof was the order of the day. He submitted that s 422 of the CPC applied to the appeals, and in the interpretation of the section the whole provisions of the CPC must be looked at in totality and the purposive approach should be adopted so as to promote the purpose or object underlying the CPC, which is for the attainment of C justice. Further, he submitted that all breaches would be against the provisions of the CPC and that s 422 was enacted to remedy the errors. Therefore, the respective learned High Court judge, instead of labelling the misdirections as illegalities or nullities by reason of the breach of an explicit provision of the CPC or breach of a principle of general importance in the administration of justice, ought to have D scrutinized the evidence in each case and applied the maximum evaluation of the evidence tendered by the prosecution and after the stringent test ought to have considered whether the errors in the judgments had occasioned a failure of justice.

(2) On the other hand, the learned counsel for the respondents asserted E that the word 'error' in s 422 of the CPC should be confined to the heading of the section, viz, 'Irregularities not to vitiate proceedings', that is to say, error not amounting to an illegality. Therefore, as the misdirections on the standard of proof as demonstrated in the appeals were illegalities they could not be cured under s 422. He submitted that, in Criminal Appeal No M-09-18-97, once the learned judge held F that the misdirection was an illegality he must set aside the verdict and should not have ordered the retrial or should not review the evidence adduced to consider whether the error had occasioned a failure of justice because the wordings of s 422 of the CPC are not in pari materia with the wordings of the proviso to s 60(1) of the Act, being G different in wordings and substance.

3(1) On 27 July 1996, *Arulpragasan* decided that the standard of proof required from the prosecution at the close of its case was the beyond all reasonable doubt standard of proof. Earlier, the Supreme Court in *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ H 265 held that the duty of the court, at the close of the case for the prosecution, is to undertake, not a minimal evaluation of the evidence tendered by the prosecution in order to determine whether or not the prosecution evidence is inherently incredible, the *Haw Tua Tau* [*Haw Tua Tau v Public Prosecutor; Tan Ah Tee v Public Prosecutor; Low Hong Eng v Public Prosecutor* [1981] 2 MLJ 49] test, but a maximum I evaluation of such evidence, to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt. Before these cases were decided the standard of

proof on the matter had always been the prima facie standard of proof and for that purpose the court was required to apply a minimal evaluation of the evidence tendered by the prosecution. That was based on the then existing provisions of s 173(f) of the CPC. However, the section was amended providing for the prima facie standard of proof at the close of the case for the prosecution, which took effect from 31 January 1997. The amendment did not have a retrospective effect because there was nothing in the amendment to suggest a contrary intention (see *Bahruni bin Ismail v Pendakwa Raya* [1997] 2 MLJ 265). The trials in the subordinate courts in respect of the instant appeals were concluded before the amendment took effect. In Criminal Appeal No M-09-18-97, the trial was concluded on 14 October 1996, in Criminal Appeal No W-09-15-98 on 27 February 1995 and in Criminal Appeal No W-09-10-00 on 10 June 1994. As such, the law prior to the amendment as established in *Arulpragasan* applied to the instant appeals. That being the case, the prima facie standard of proof applied by the trial courts at the close of the prosecution case are clearly misdirections of law on the standard of proof. In our view, the misdirections are to be regarded as errors in the judgments for the purpose of s 422 of the CPC.

(2) The aftermath of the two cases especially *Arulpragasan* had given rise to two opposite views in our appellate courts on the interpretation of s 422 of the CPC in relation to a misdirection on the standard of proof. The first view held that a misdirection on the standard of proof was an illegality not curable under s 422 where it involved the breach of an explicit provision of the CPC or where the breach involved a principle of general importance in the administration of justice. The other view seemed to hold otherwise if the misdirection did not occasion any failure of justice. On the first view, this Court in *Surandran a/l Rajaretnam v Public Prosecutor* [1998] 2 MLJ 49 held that the application by the learned sessions court judge and the learned High Court judge of the prima facie standard of proof at the close of the prosecution case was a misdirection not curable under s 422 of the CPC. In *Harun bin Abdullah*, this court upheld the conclusion on the law by Augustine Paul JC (as he then was) in *Ishak Shaari*. In *Public Prosecutor v Pasupathy s/o Kanagasabai* [2001] 2 MLJ 143, this court, following the decisions in *Surandran* and *Harun* held that a misdirection on the standard of proof was incapable of being cured under s 422 of the CPC. The same was decided by this Court in *PP v Ku Yahya Ku Bahari & Anor* [2002] 1 CLJ 113 and further, held that the High Court has no power similar to that given to the Court of Appeal by the proviso to s 60(1) of the Act. There is a catenation of cases on the first view and will suffice to cull and refer as aforesaid. With regard to the opposite view, in *Rosli bin Supardi v Public Prosecutor* [2002] 3 MLJ 256, Gopal Sri Ram JCA said at p 261-262:

> Both *Ishak Shaari* and *Hanm Abdullah* were relied upon by learned counsel for the appellant before us. But we find *Harun Abdullah* readily distin-

guishable from the present case. In *Harun*, this court having come to the conclusion that s 422 cannot be invoked to cure a misdirection by the trial court on the issue of standard of proof by the prosecution, went on to undertake an exhausted review of evidence. It then found that at p12:

> '...applying the more stringent reasonable doubt test to the facts of this case on the evidence available, we could only conclude that the result would certainly not be the same as we hold that no case had been made out against the appellant beyond reasonable doubt. Consequently, the defence of the appellant should not have been called.'

In other words, this court was satisfied that if s 422 had been invoked, it could not, on the facts of the case, have cured the failure of justice that had been occasioned to the appellant in that case. To put it shortly, the section did not apply because a proper direction on the standard of proof would have resulted in an acquittal of the appellant.

So far as *Jshak Shaari* is concerned, it no longer in our view represents the law. For in *Tunde Apatira & Ors v PP* [2001] 1 MLJ 259, a full Federal Court found that in an exceptional case where the evidence is clear and cogent, an appellate court may affirm a conviction despite a misdirection. In the course of its judgment, the Federal Court observed that there was no material difference between the phrase 'miscarriage of justice' in the proviso to s 60(1) of the Courts of Judicature Act 1964 and the phrase 'failure of justice' appearing in s 422 of the Code. There is therefore, serious doubt in our minds as to the correctness of the proposition made in *Jshak Shaari* that a misdirection as to the standard of proof must automatically and without more result in a setting aside of a conviction despite s 422 of the Criminal Procedure Code.

...

... Since *Tunde Apatira,* there is no essential difference between the proviso to s 60(1) and s 422.

The court also held that it was not open to the learned High Court judge to rely on the proviso to s 60(1) of the Act. That proviso is exclusive to the Court of Appeal and the Federal Court and as far as the High Courts are concerned, they must act within the confines of s 422 of the CPC. In *Lokhman bin Abu v Public Prosecutor* [2001] 1 MLJ 311, this court held that the provision of s 422 of the CPC is in pari materia with the proviso to s 60(1) of the Act. Both these sections have received judicial treatment. It is now settled that if there is sufficient evidence to warrant the conviction, that would be a good ground for holding that there was no miscarriage or failure of justice. In *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251 the Supreme Court expressed the view that the words 'failure of justice' in s 422 of the CPC should carry the same meaning as 'miscarriage of justice' under the proviso to s 60(1) of the Act.

(4) Our provision of s 422 of the CPC is in pari materia with the provision of s 537(a) of the Indian Code of 1898 ('the old Code') and s 465(1) of the Indian Code of 1973 ('the new Code'). Therefore, we are persuaded to refer to some of the Indian authorities decided especially under the old Code in order to gather some guidance to enable us to determine the issue at hand, that is to say, whether a misdirection on the standard of proof is curable under section 422 of the CPC. Our s 422 reads:

> Irregularities not to vitiate proceedings
>
> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of -
>
> (a) of any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code; or
>
> (b) ...
>
> (c) ...
>
> unless such error, omission, irregularity, ... has occasioned a failure of justice.

Section 537(a) of the old Code states:

> 537 *Finding or sentence when reversible by reason of error or omission in charge or other proceedings.* Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction, shall be reversed or altered under Chapter XXVII or on appeal or revision on account -
>
> (a) of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> unless such error, omission, irregularity, or misdirection has in fact occasioned a failure of justice.

Section 465(1) of the new Code provides:

> *465 Finding or sentence when reversible by reason of error, omission or irregularity.* (1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any

A error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

In *Pulukuri Kottaya & Ors v Emperor* AIR 1947 PC 67, there was a breach of the proviso to s 162 of the old Code during the trial of the appellants. The B breach was the failure of the prosecution to supply the defence at the proper time with copies of statements which had been made by important prosecution witnesses during the course of the preliminary police investigation. On the submission of the counsel for the appellants that a breach of a direct and important provision of the old Code could not be cured under the provision of s 537, Sir John Beaumont said:

C

> In their Lordships' opinion this argument is based on too narrow a view of the operation of s 537. When a trial is conducted in a manner different from that prescribed by the Code as in *Subrahmania Iayar v Emperor* 8 Sar 160 PC; 28 IA 257, the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner pre-
> D scribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under s 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds
> E support in the decision of their Lordships' Board in *Abdul Rahman v Emperor* 14 AIR 1927 PC, 44; 5 Rang 53, where failure to comply with s 360, Criminal P C, was held to be cured by ss 535 and 537. The present case falls under s 537, and their Lordships hold the trial valid notwithstanding the breach of s 162. (Emphasis added.)

F

In *Willie (William) Slaney v State of Madhya Pradesh* AIR 1956 SC 116, each of the two accused W and R were charged separately with the same murder under s 302 with s 34 of the Penal Code. There was no separate alternative charge under s 302. The court below held that accused W inflicted the fatal blow and held him guilty as charged while the other accused R was G acquitted for absence of evidence against him. The accused W contended that as he was not charged with having murdered the man personally he could not be convicted under s 302. He claimed that the conviction was an illegality which could not be cured. The Supreme Court held that having regard to the nature of the charge framed the omission to frame a separate charge under s 302 of the Penal Code against W was only a curable H irregularity which in the absence of prejudice could not affect the legality of conviction under s 302. On the facts of the case it was held that there was no prejudice to the accused by way of failure of justice. Bose J on behalf of himself and SR Das Acting CJ in expressing the opinion of the court on the general effect of the decisions of the Privy Council, said:

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> First comes a class of case in which the Code deals with the matter expressly. In that event, full effect must be given to the plain meaning of the words used.

Next comes a class of case for which there is no express provision in the Code, or *where there is ambiguity.* In that event, the question is whether the trial has been conducted in 'substantial' compliance with the Code or in a manner 'substantially' different from that prescribed. A

Now it is obvious that the question curing an irregularity can only arise when one or more of the express provisions of the Code is violated. The question in such cases is whether the departure is so violent as to strike at the root of the trial and make it no trial at all or is of a less vital character. It is impossible to lay down any hard and fast rule but taken by and large the question usually narrows down to one of prejudice. In any case, the courts must be guided by the plain provisions of the Code without straining at its language wherever there is an express provision. B C

For a time it was thought that all provisions of the Code about the *mode of trial* were so vital as to make any departure therefrom an illegality that could not be cured.

Later this was construed to mean that that only applied when there is *an express prohibition and there is prejudice.* D

Except where there is something so vital as to cut at the root of jurisdiction or so abhorrent to what one might term natural justice, the matter resolves itself to a question of prejudice. Some violations of the Code will be so obvious that they will speak for themselves as, for example, a refusal to give the accused a hearing, a refusal to allow him to defend himself, a refusal to explain the nature of the charge to him and so forth. These go to the foundations of natural justice and would be struck down as illegal forthwith. It hardly matters whether this is because prejudice is then patent or because it is so abhorrent to well-established notions of natural justice that a trial of that kind is only a mockery of a trial and not of the kind envisaged by the laws of our land, because either way they would be struck down at once. E F

Other violations will not be so obvious and it may be possible to show that having regard to all that occurred no prejudice was occasioned or that there was no reasonable probability of prejudice. In still another class of case, the matter may be so near the border line that very slight evidence of a reasonable possibility of prejudice would swing the balance in favour of the accused. G

This, in our opinion, has been the trend of the more recent decisions of the Privy Council and indeed of latter-day criminal jurisprudence in England as well as in India. The swing of the pendulum has been away from technicality, and a greater endeavour has been made to regard the substance rather than the shadow and to administer justice fairly and impartially as it should be administered; fair to the accused, fair to the State and fair to the vast mass of the people for whose protection penal laws are made and administered. H I

The more recent attitude of the Judicial Committee is summed up by Sir John Beaumont in AIR 1947 PC 67 at pp 69-70 where he says that:

A 'The distinction drawn in many of the cases in India between an illegality and an irregularity is one of 'degree' rather than of 'kind'.'

and by Viscount Summer in *Atta Mohamad v Emperor* AIR 1930 PC 57 (2) at p 59 (G):

B 'In the complete absence of any substantial injustice, in the complete absence of anything that outrages what is due to natural justice in criminal cases, their Lordships find it impossible to advise Mis Majesty to interfere.'

We prefer this way of stating the law, for the distinction that was once C sought to be drawn between *an express prohibition and an equally express provision positively stated* strikes us as unreal. The real question is not whether a matter is expressed positively or is stated in negative terms but whether *disregard, of a particular provision amounts to 'substantial' denial of a trial as contemplated by the Code and understood by the comprehensive expression 'natural justice'.*

D It will be observed that disregard of an *express prohibition* was regarded as curable in *Zahiruddin v Emperor* AIR 1947 PC 75, so the question whether a particular provision is stated in positive or in negative terms is not the true criterion. (Emphasis added.)

E What are discernible from these authorities are –

(a) Where the old Code deals with the matter expressly, full effect must be given to the plain meaning of the words used.

F (b) Where there is no express provision in the old Code or *where there is ambiguity*, the question is whether the trial has been conducted in substantial compliance with the old Code or in a manner substantially different from that prescribed. When a trial is *conducted in a manner or mode different from that prescribed by the old Code* the trial is bad and the question of curing an irregularity does not arise, but if the trial is G conducted substantially in the manner prescribed by the old Code, but some *irregularity occurs in the course of such conduct* the irregularity can be cured under s 537, and nonetheless so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the old Code.

H (c) At one time it was thought that all provisions of the old Code about the mode of trial were so vital as to make any departure therefrom an illegality that could not be cured. However, later this was construed to mean that the situation only applies when there is an *express prohibition and there is prejudice.*

I (d) Some violations of the old Code which obviously go to the foundation of natural justice will be struck down as illegal notwithstanding prejudice or otherwise.

(e) The distinction that was once sought to be drawn between an *express prohibition and an equally express provision positively stated* is unreal. And the question whether a particular provision is stated in positive or in negative terms is not the true criterion because as decided in a case that disregard of an *express prohibition* was regarded as curable.

Although the Indian cases cited are not concerned with a misdirection on the standard of proof nonetheless, the principles established therein are of great persuasive force as they deal with the interpretation of s 537 of the old Code, the equivalent of our s 422.

5(1)The CPC is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the CPC is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice. If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is 'substantial' compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the CPC and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the CPC is based. The modern trend should be to swing away from technicality and a greater endeavour should be made to regard the substance rather than the shadow and to administer justice fairly and impartially as it should be administered; fair to the accused person, fair to the State and fair to the society for whose protection penal laws are made and administered (see *Willie (William) Slaney*). In order to interpret s 422 the whole provisions of the CPC must be looked at in totality and the purposive approach should be adopted so as to promote the basic principle on which the CPC is based.

(2) Section 422 of the CPC is couched in comprehensive form. Subsection (a) of the section only states 'any error, omission or irregularity ...'. It does not mention 'illegality'. Be that as it may, as stated by case law, the distinction drawn in many of the cases in India between an illegality and an irregularity is one of 'degree' rather than of 'kind'. To our mind, the non-mention of 'illegality' in the subsection reflects the wisdom of Parliament in that, the court is given the discretion to decide whether in a particular case any error, omission or irregularity is curable but with the caveat that such error, omission or irregularity has not occasioned a failure of justice. And in the exercise of that discretion it is incumbent on the court to have regard to the promotion of the basic principle on which the CPC is based in the light of case law. Therefore, the errors in the judgments in the form of a misdirection on the standard of proof in these appeals should not be struck down automatically as illegalities, or as it were,

by rule of thumb without first considering whether the accused has had a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice and thereafter, to decide whether the misdirection has occasioned a failure of justice otherwise the intention of Parliament in enacting s 422 is defeated. We prefer to approach the misdirection for the purpose of s 422 of the CPC in this manner. To begin with, to identify the error and then to identify the provision of the CPC that has been breached and thereafter, to apply the case law in order to determine whether the error can be cured under the section by reason that the misdirection has not occasioned a failure of justice and then if, only if the error has occasioned a failure of justice to declare the trial a nullity by reason that the misdirection tantamounts to an illegality. It has been identified that the error in these appeals is a misdirection on the standard of proof on the prosecution at the end of its case and in Criminal Appeal No M-09-18-97 at the end of the trial. In respect of the other two appeals, although the respective learned judge of the High Court did not deal with the misdirection at the end of the trial, from the respective record of appeal we discover that there was a misdirection at the end of the trial similar to Criminal Appeal No M-09-18-97. The provision of the CPC that had been breached in these appeals is the then existing s 173(f) of the CPC, which expressly provides :

> The following procedure shall be observed by magistrates in summary trials
>
> (f) If, upon taking all the evidence herein before referred to, the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the Court shall record an order of acquittal.

And the misdirection on the standard of proof at the end of the trial involves a breach of the basic principle of criminal law, that is to say, the cardinal principle in criminal law is the duty of the prosecution to prove the guilt of the accused beyond all reasonable doubt. In short, the first breach is a breach of an explicit provision of the CPC and the second breach involves a principle of general importance in the administration of justice. Although the respective learned High Court judge had given the right reasons for the breaches, with due respect, we do not agree with the conclusions that the misdirections were illegalities for which s 422 of the CPC could not be invoked to cure the breaches without proper consideration as to whether or not the misdirection had occasioned a failure of justice. The words 'unless such error, omission or irregularity ... has occasioned a failure of justice' at the end of s 422 qualify the entire section. In our view, having regard to the aforesaid object of the CPC, the issue whether or not the misdirection has occasioned a failure of justice can be resolved by seeking answers to certain corollary questions, namely, did the accused have a fair trial, did he know what he was being tried for and whether the allegations and facts were explained to him fairly and clearly and whether he was given a full and fair

chance to defend himself? If the answers are in the affirmative, the only conclusion is that there has been no prejudice and failure of justice. If the answers are in the negative, the trial must necessarily be treated as vitiated. If there exists a reasonable doubt regarding the answers, the benefit of doubt must be given to the accused. But, none of the learned High Court judges in these appeals did really consider whether or not the misdirection had occasioned a failure of justice. They simply struck it down as an illegality for the aforesaid reasons. With due respect, we are of the opinion that such approach is not in consonance not only with the modern trend but also not in keeping along with certain well-established and well-understood lines that accord with our notion of natural justice that can be discerned from the Indian experience. We say so because, firstly, on the reasoning of the respective learned High Court judge that the misdirections were illegalities as they breached an explicit provision of the CPC, the Indian authorities cited above had established that the distinction that was once sought to be drawn between an express prohibition and an equally express provision positively stated is unreal. Further, the question whether a particular provision is stated in positive or in negative terms is not the true criterion, because a disregard of an express prohibition was regarded as curable. Secondly, we are of the view that, although the then existing s 173 (f) of the CPC had expressly provided the standard of proof, there was an ambiguity in the provision with regard to the standard of proof required of the prosecution at the close of its case at the time when the trials were held. However, that ambiguity was finally resolved when *Arulpragasan* was decided. That being the case, guided by the Indian cases, the question we should ask. ourselves is whether the trials had been conducted in substantial compliance with the CPC or in a manner substantially different from that prescribed. If the trials were conducted in a manner or mode different from that prescribed by the CPC the trials were bad and the question of curing an irregularity did not arise, but if the trials were conducted substantially in the manner prescribed by the CPC, but some irregularities occurred in the course of such conduct the irregularity could be cured under s 422 and nonetheless so because the irregularity involved, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the CPC. From the respective record of appeal we are satisfied that the trials of the respondents had been conducted substantially in the manner prescribed by the CPC but the misdirection on the standard of proof only arose in the conduct of the trials. That being the case, again guided by the Indian cases, the misdirection could be cured under s 422. Even if we are to regard that the misdirection on the standard of proof as part of the provisions about the mode of trial which at one time were so vital as to make any departure therefrom an illegality that could not be cured, that was later construed to mean that the situation only applies when there is an express prohibition and there is no prejudice. In these appeals before us, there is no express prohibition as such in the CPC. Whatever it is what remains to be considered is whether there is sufficient evidence to support the conviction in a particular case and if there is, that would be a good ground for holding that there was no miscarriage or failure of justice. The same consideration

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applies to the misdirection at the end of the case. Therefore, we conclude that the misdirection on the standard of proof in a trial which has been conducted in substantial compliance with the CPC is curable under s 422 of the CPC provided that there is sufficient evidence to support the conviction, as the error has not occasioned a failure of justice.

6 We agree with the statements of this Court in *Lokhman bin Abu* and in *Rosli bin Supardi* that since *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259, there is no essential difference between the proviso to s 60(1) of the Act and s 422 of the CPC and that they mean the same thing. If it is construed otherwise, it will lead to absurdity because there will be a disparity in the power to cure any error, omission or irregularity between the appellate courts at different levels. Further, the situation may create a temptation on the learned High Court judge who, in attempting to do justice in a case, may usurp the powers of the Court of Appeal under the proviso to s 60(1) of the Act, as already succumbed in *Rosli bin Supardi.*

7 Now, what remains to be considered is whether the proviso to s 60(1) of the Act should be applied to these appeals. With regard to the Criminal Appeal No M-09-18-97, we agree with the learned High Court judge that the sessions court judge had misdirected himself on the requirement of corroboration and therefore, the retrial order made is proper. In respect of Criminal Appeal No W-09-15-98, we agree with the retrial order because the assessment on the credibility of witnesses by the learned magistrate had been jeopardized. The learned magistrate took over and continued with the trial from another magistrate after the prosecution closed its case and thereafter the counsel for each of the accused attacked, inter alia, the credibility of the prosecution witnesses at length. Therefore, we decline to apply the proviso to s 60(1) of the Act to this appeal. In agreeing to the retrial order we are fully aware of what was said by Lord Diplock in *Reid v The Queen* [1980] AC 343 at p 348 that to order a new trial would be to give the prosecution a second chance to make good the evidential deficiencies in its case; but we are satisfied that this is not such a case here. However, in the case of Criminal Appeal No W-09-10-00, upon a scrutiny of the evidence, we are satisfied that, despite the misdirection, the evidence is overwhelming to support the conviction. We would prefer to remit this appeal to the learned High Court judge for his consideration under s 422 of the CPC so as not to deprive either party of one tier of appeal. However, as the learned High Court judge had since retired we have no choice but to apply the proviso to s 60(1) of the Act to this appeal as from the record of appeal we are satisfied that no substantial miscarriage of justice has occurred.

8 Therefore, Criminal Appeals Nos M-09-18-97 and W-09-15-98 are dismissed. Criminal Appeal No W-09-10-00 is allowed. The orders of the learned High Court judge in setting aside the conviction and sentence, for the refund of the fine paid and for a retrial of the case are set aside. The conviction entered by the trial court is restored.

However, we have now to consider the appeal by the respondent against sentence and the cross-appeal by the Public Prosecutor on the inadequacy of sentence. The respondent withdraws his appeal and the Public Prosecutor follows suit in respect of the cross-appeal. We confirm the sentence imposed by the learned sessions court judge.

Order accordingly.

Reported by Sivapragasan Kumaran